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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 1200 of 2001

in

SPECIAL CIVIL APPLICATION No 9316 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.K.TRIVEDI
and
HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : YES

EMPLOYEES STATE INSURANCE SCHEME
Versus
DAMJIBHAI CHAKUBHAI PATEL

Appearance:
1. LETTERS PATENT APPEAL No. 1200 of 2001
MR SP HASURKAR, AGP for Appellant
MR TR MISHRA for Respondent

CORAM : HON'BLE MR.JUSTICE D.K.TRIVEDI
and

HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 28/01/2005

CAV JUDGEMENT

(Per : HON'BLE MR.JUSTICE K.M.MEHTA)

1. The State of Gujarat, through the Employees State Insurance Scheme, through its Director of Medical Services, E.S.I. Scheme, Ahmedabad, appellant - original petitioner (herein after referred to as petitioner) has filed this appeal under clause 15 of the Letters Patent against the judgment and order dated 14.8.2001 passed by the learned single Judge in Special Civil Application No.9316 of 1993. The learned single Judge, by the impugned judgment and order, has partly allowed the petition filed by the petitioner. The learned Judge also modified the award dated 28.12.1992 passed by the Labour Court, Valsad, in Reference (LCV) No.1718 of 1990, to the extent that Damjibhai Chakubhai Patel - opponent original respondent (hereinafter referred to as respondent), Medical Officer in Ayurvedic Division, shall be entitled to 40% back wages for the period from 27.4.1989 till he is reinstated in service. The learned Judge confirmed the rest of the award and made the rule absolute to that extent and the interim relief granted earlier by the Court was vacated.

2. It may be noted that the tribunal by its award pleased to accept the reference of the respondent and pleased to hold that the order dated 27.4.1989 by which respondent was relieved from service be quashed and set aside and he is reinstated with full back wages from 27.4.1989 till he is reinstated and also awarded costs of Rs.200/- by his order dated 28.12.1992.

3. The relevant facts giving rise to this appeal are as under:-

BACK GROUND OF THE MATTER:-

3.1 Petitioner appointed the respondent to the post of Ayurvedic Insurance Medical Officer, Class-II (Ayurvedic Division) on ad-hoc basis. Though order is dated 23.12.1983, the respondent commenced services from 29.12.1983. In the appointment order it was expressly stipulated that the services of the respondent were liable to be terminated either on completion of one year or the Government appoint any officer through Gujarat Public Service Commission, whichever is earlier. It may be noted that the appointment was absolutely on ad-hoc and the said can be terminated without giving any notice.

3.2 It may be noted that the post to which the respondent was appointed was a post of Ayurvedic Insurance Medical Officer, ESI Scheme. The said post fell within the purview of Gujarat Public Service Commission Recruitment (hereinafter referred to as "GPSC"). The said post is therefore required to be filled in by the GPSC. However, the petitioner is entitled to make temporary ad-hoc appointment to the said post for a period not exceeding one year or time till the regular candidate selected by GPSC becomes available.

3.3 It is the case of the petitioner that the respondent joined the duty on 29.12.1983, appointment was due to come to an end on 28.12.1984. Since the post was one of Medical Officer and patients who suffer, if there were to occur any vacancy in the post of the practice of the Directorate is to inquire of the incumbent of the post in advance whether the incumbent would want to continue in service and if so to apply in good time before the expiry on the period of appointment. The Director also receives performance report from the superior officer concerned. Following this practice, the petitioner was given fresh appointment for a period of six months in accordance with direction of the Government in that behalf. The second appointment was for period from 2nd January, 1985 to 1st July, 1985. Likewise on expiry of the said period of six months following the aforesaid practice the petitioner gave appointment to the respondent for a further period of six months from 3rd July, 1985 to 2nd January, 1986. In view of the same, appointment came to be end after the office hours on 2nd January, 1986.

3.4 As the respondent apprehended that his appointment may not be continued, the respondent filed Special Civil Application No.5 of 1986 before this Court on 2nd January, 1986. On that day, this Court issued notice and granted interim relief namely in that case the respondent (who is petitioner herein) was directed not to terminate the petitioner's service - (respondent herein) and further directed the respondents in that case to allow the petitioner to discharge his duties and to draw his salary regularly in this behalf.

3.5 It may be noted that in that case, pursuant to notice issued, one Mahendra J.Vaidya, Senior Medical Inspector in ESI, Ahmedabad has filed affidavit-in-reply dated 10th February, 1986, and pointed out to this court that somewhere in 1985, the department issued a report that the respondent was interested in other activities of

the incharge officer and interference in every work and he was not co-operative in service, he was also involved in criminal proceeding and that his superior officer had to interfere in the matter and to get the proceedings withdrawn. In these circumstances, the petitioner decided not to give a fresh appointment to the respondent. The respondent was on leave for a few days in the last week but on 2nd January, 1986, which was last date of his appointment the respondent discharged his function till then.

3.5A It may be noted that the petitioner has also filed rejoinder somewhere in November 1986 in Special Civil Application No.5 of 1986 and controverted the facts set out by the Government in this behalf. He has reiterated that he has discharged his duties for a period exceeding 240 days in a calender year and his services can be terminated only in accordance with the provisions contained under the Industrial Disputes Act, 1947. He has also controverted the facts of the Government regarding working. He has stated that Performance Report made by his superior was in his favour and no fault was found with his performance by his superior in the past.

3.6 In view of the interim order of this Court, the respondent continued in service. However, matter reached for final hearing before this Court (Coram: R.C.Mankad & P.M.Chauhan, JJ.) on 30th March, 1987, when this Court passed the following order:

> "Mr.D.M.Thakkar, learned Counsel for the petitioner seeks permission to withdraw this petition as the petitioner desires to approach the competent authority by way of representation to continue him in service. He, however, prays that in order to enable the petitioner to approach the competent authority, ad-interim may be continued for a reasonable time. Permission to withdraw petition granted. Petition shall stand disposed of as withdrawn. Notice discharged. However, to enable the petitioner to make representation to the competent authority, ad-interim relief granted by this Court will continue to remain in operation for two weeks from to-day. It will be open to the petitioner to make representation to the competent authority to continue him in service and to make request to the said authority to continue him in service until his representation is decided. There shall be no order as to costs."

3.7 It appears that pursuant to the aforesaid order, the respondent made representation on 13th April, 1987, to the Director of Medical Services and he was continued in service.

3.8 When the aforesaid representation was pending, the respondent straightway filed a Writ Petition being No.1290/88 before the Hon'ble Supreme Court under Article 32 of the Constitution of India. The Hon'ble Supreme Court by its order dated 16th April, 1989, pleased to pass the following order:

> "Writ petition is dismissed. The respondents, however, will be at liberty to consider the case of the petitioner in case any future vacancy occur after giving him an opportunity to appear in the examination that may be held by the Gujarat Public Service Commission."

3.9 The State Government through Under Secretary, Health & Family Planning Department has passed the order dated 15th April, 1989, by which the Government has decided to appoint medical officers who are selected by GPSC and by that time the services of the respondent was sought to be removed on the ground that the respondent was not selected through GPSC. It may be noted that further orders was also passed on 27th April, 1989, by Incharge Medical Officer relieving the respondent from the service.

3.10 Being aggrieved and dissatisfied with the said action, the petitioner filed Special Civil Application before this Court being SCA No.4078 of 1989 on 22nd June, 1989.

3.11 Meanwhile, when the aforesaid petition was pending, the petitioner - respondent herein raised a substantive industrial dispute approached the Labour Court in June 1989 and, therefore, the aforesaid writ petition was disposed of by this Court on 17th January, 1990.

3.12 It may be noted that the order under sec.10(1)(c) of the I.D.Act was passed by the Labour Commissioner on 30th June, 1989, and dispute between respondent and petitioner were referred to Labour Court, Navsari. The Industrial Court, Ahmedabad, has also passed necessary orders in this behalf.

PRESENT CONTROVERSY:-

3.13 Before the labour court, the respondent filed his statement of claim at Exh.7 and set out all the facts which I have stated earlier.

3.14 The petitioner herein who are opponent in the Labour Court also filed reply at Exh.11 and set out all the facts which I have stated earlier in this behalf. It was stated that the respondent was not a workman, his salary is fixed at Rs.2000-3500, he was a Class-II Gazetted Officer. He was also working as a Head of the Centre in Ayurvedic Insurance Division as Medical Officer. The provisions of BCSR Rules are applicable to him and the order passed by the High Court from time to time were also set out. The respondent also pointed out that the Supreme Court has also dismissed the petition filed by the respondent, so Labour Court has no jurisdiction. It was also stated that the appointment to the said post is made pursuant to the recommendation of the GPSC and his appointment was not made by GPSC and his appointment was only ad-hoc, he was relieved from the service by the department in this behalf. So Reference is not maintainable at law.

3.15 The claimant also examined at Exh.31 and gave his oral evidence. The department has also been examined by one Damjibhai Chakubhai Patel at Exh.31, who was Incharge Medical Officer. The parties filed a written submissions and other documentary evidence were also produced.

LABOUR COURT - FINDINGS & AWARD:-

3.16 The Labour Court by its judgment and award dated 28th December 1992 passed in Reference Nos.1718/1990 pleased to hold that the respondent has worked for 240 days during the year. Respondent has worked from 15th April 1987 to 26th April 1989. The activity of the petitioner - appellant falls within the definition of 'Industry' and the respondent also falls within the definition of workman and, therefore, provisions of Industrial Disputes Act apply. In view of the same, the petitioner - appellant removed the respondent workman, notice as contemplated under Section 25F of the Industrial Disputes Act ought to have been given. As the said provisions have not been complied with, the order dated 27th April 1989, removing the respondent be quashed and set aside and the Labour Court directed that respondent should be reinstated in services and petitioner - appellant was directed to pay entire back wages to respondent from 27th April 1989, till he has been reinstated.

3.17 Being aggrieved and dissatisfied with the aforesaid judgment and order of the tribunal, the appellant filed Special Civil Application No.9316 of 1993 before this Court under Article 226 and 227 of the Constitution of India. In that petition, when the matter was placed for hearing before this Court (Coram: R.A.Mehta & B.J.Shethna, JJ.) on 2.12.1993 pleased to admit the matter and also granted interim stay of the impugned award and fixed the matter for final hearing on 20.12.1993. In that petition, the petitioner - present respondent had also filed affidavit that he was not employed anywhere.

FINDINGS OF LEARNED SINGLE JUDGE:-

3.18 When the aforesaid matter was placed for hearing before this Court, on 14.8.2001 this Court by his judgment and order pleased to partly allow the petition of the petitioner - ESI Scheme and pleased to modify the award to the extent that the respondent shall be entitled to 40% of back wages for the period from 27.4.1989 till he is reinstated in service. The rest of the award remains intact. Rule made absolute to that extent and interim relief granted earlier was vacated.

3.19 Being aggrieved and dissatisfied with the said judgment and order of the learned Single Judge, the appellant herein filed Letters Patent Appeal being LPA No.1200 of 2001 before this Court somewhere in October, 2001. In that LPA, a civil application No.11984 of 2001 was also filed for the stay of the order of the learned Single Judge passed in Special Civil Application No.9316 of 1993 dated 14.8.2001 and this Court granted interim relief in the said civil application in terms of para 4(B) on 7.11.2001. Though the Division Bench on 28.11.2002 pleased to pass the order that the matter to be placed for final hearing board, the matter was not heard and ultimately the Division Bench on 13.10.2003 directed that while confirming the interim relief against grant of even 40% back wages, stay against reinstatement is vacated and the appellant was directed to reinstate the respondent workman on or before 1.12.2003. The Division Bench also directed that let the main LPA No.1200 of 2001 be posted for final disposal in the first week of July 2004.

3.20 We have been told that pursuant to the aforesaid order, the respondent had already joined services in the petitioner department.

3.21 In view of the aforesaid order/direction of the

Division Bench, the LPA No.1200 of 2001 was placed for hearing before this Court.

4. Before the Division Bench of this Court, Mr.Hasurkar, learned Asst. Government Pleader appeared on behalf of the appellant - original petitioner State of Gujarat and Mr.T.R.Mishra, learned advocate appeared on behalf of the respondent workman.

PRELIMINARY CONTENTION REGARDING MAINTAINABILITY OF LETTERS PATENT APPEAL RAISED BY MR T.R.MISHRA:-

5. Mr.T.R.Mishra, learned advocate for the respondent took preliminary objections that the present Letters Patent Appeal filed by the State of Gujarat is not maintainable at law as the LPA has been filed against the order of the learned Single Judge where the learned Single Judge has exercised the powers under Article 227 of the Constitution of India. He, therefore, submitted that the LPA filed by the State is not maintainable at law. In support of the same, he has relied upon Division Bench judgment of this Court in the case of ISHWARBHAI NAROTTAMBHAI PATEL VS. K.H.TRIVEDI AND OTHERS reported in 2003(3) GLR 1878. In para 12 the Division Bench has laid down the following principle regarding maintainability of the petition on page 1886 and 1887 as under:

"...(i) Whether the petitioner has invoked jurisdiction of this Court under Art.226 or Art.227, if the learned Single Judge has exercised jurisdiction under Art.226, Letters Patent Appeal would be maintainable.

(ii) If the judgment rendered by the learned Single Judge is in exercise of jurisdiction under Art.227 of the Constitution, Letters Patent Appeal would not be maintainable.

(iii) If the Single Judge has not stated whether he has exercised his jurisdiction under Arts. 226 or 227 of the Constitution, it would be relevant to examine whether the proceeding in question is an original proceeding or the proceeding challenges the decision of a Tribunal. If the proceeding is original,

the petition would obviously be under Art.226.

If the petition challenges the decision of a Tribunal, further inquiry should ensue. The expression "Tribunal" would include within its ambit adjudicating bodies, provided they are constituted by the State and are invested with judicial, as distinguished from purely administrative or executive functions. The principal test of determining the character of the authority as Tribunal is whether that authority is empowered to exercise any adjudicating power of the State and whether the same has been conferred on it by any statute or a statutory rule.

If the Tribunal or the Court has exercised judicial function of the State as explained in the decision of the Apex Court in State of Maharashtra v. Labour Law Practitioner's Association, 1998(2) GLR 1079 (SC) : AIR 1998 SC 1233 and the Tribunal or the Court is subordinate to the High Court within the meaning of Art.235 of the Constitution, then a presumption will be raised that the single Judge has exercised his jurisdiction under Art.227 of the Constitution.

(iv) If the single Judge has not stated under which provision he has decided the matter and where the facts justify filing of petition both under Art.226 and Art.227 and the Court has decided the petition on merits, the Letters Patent Bench would consider whether substantial part of the order sought to be appealed against is under Art.226 or not. If it is found that the substantial part of the order sought to be appealed against is under Art.226, Letters Patent Appeal would be maintainable, but not otherwise.

(v) If substantial part of the order sought to be appealed against is under Art.226, Letters Patent Appeal would not become non-maintainable merely because in the final order the single Judge has given ancillary directions which may pertain to Art.227."

LEARNED AGP MR.HASURKAR'S REPLY TO THE PRELIMINARY

CONTENTION REGARDING MAINTAINABILITY OF THE LETTERS PATENT APPEAL:-

6. Mr.Hasurkar, learned AGP stated that in this case, though the State Government had challenged the order of Tribunal, the real test is whether the learned Single Judge has exercised jurisdiction under Article 226 of the Constitution of India, or he has exercised jurisdiction under Article 227 of the Constitution of India. Herein, in this matter, the learned Single Judge when observed in the judgment that "respondent was subject to unequal treatment and hostile discrimination even as this matter was pending with an order for final hearing." . The learned Single Judge has clearly exercised jurisdiction under Article 226 of the Constitution of India. More particularly, when he has considered affidavit, which was submitted in the course of hearing the petition under Article 226/227 of the Constitution of India. Even while confirming the judgment of the learned Labour Court, he has further held that "service about 2 years is correctly found and held not be subjected to any conditions or stipulation." The learned Single Judge while holding that, termination of services of respondent amount to retrenchment, the learned Single Judge has not considered Clause (bb) of Section 2(oo) of the Industrial Disputes Act and because it contemplates that: "termination of service of workman as a result of non renewal of contract of employment between employer and workman concerned of its expiry or of such contract being terminated under stipulation on that behalf contended therein."

7. Mr.Hasurkar, learned AGP has stated that it is no doubt true that when the learned Single Judge was considering the award of the tribunal, the learned Single Judge exercised the powers under Art.227 of the Constitution of India. However, the learned Single Judge has considered the entire facts and circumstances of the case and thereafter the learned Single Judge has partly allowed the petition filed by the State while the learned Single Judge has confirmed the award of the tribunal so far as reinstatement is concerned, but as regards back wages, when the tribunal had granted 100% back wages, the learned Single Judge has reduced the back wages to 40%, at that time the learned Single Judge has exercised the powers under Article 226 of the Constitution of India and, therefore, in that case the learned Single Judge has exercised the powers both under Arts.226 and 227 of the Constitution of India and, therefore, appeal filed by the State is maintainable.

7.1 In support of the aforesaid submissions, learned AGP has relied upon the following decisions in this behalf:

(1) In the case of Lokmat Newspapers Pvt.Ltd. Vs. Shankarprasad reported in (1999) 6 SCC 275 particularly on page 296 after relying the earlier judgment of the Apex Court in the case of Keshao Meshram vs. Radhikabai reported in 1986 Supp SCC 401 the court has observed as under:

> "The aforesaid decision squarely gets attracted on the facts of the present case. It was open to the respondent to invoke the jurisdiction of the High Court both under Articles 226 and 227 of the Constitution of India. Once such a jurisdiction was invoked and when his writ petition was dismissed on merits, it cannot be said that the learned Single Judge had exercised his jurisdiction only under Article 226 (sic 227) of the Constitution of India. This conclusion directly flows from the relevant averments made in the writ petition and the nature of jurisdiction invoked by the respondent as noted by the learned Single Judge in his judgment, as seen earlier. Consequently, it could not be said that clause 15 of the Letters Patent was not attracted for preferring appeal against the judgment of the learned Single Judge."

(2) In the case of Kanhaiyalal Agrawal and Others vs. Factory Manager, Gwalior Sugar Company Ltd. reported in (2001) 9 SCC 609 particularly para 6 on page 613 the Court has observed as under:

> "So far as the law on the matter is concerned, as to whether an appeal would lie against an order made in writ petition before the High Court challenging an order of the Labour Court, this Court in its decision in Lokmat Newspapers (P) Ltd. V. Shankarprasad ((1999) 6 SCC 275 : 1999 SCC (L&S) 1090) stated that if a Single Judge exercises jurisdiction under Article 226, letters patent appeal would be maintainable, but if the jurisdiction is exercised under Article 227 it will not be maintainable. But with an explanation that if the Single Judge of the High Court in considering the petition under Article 226 or Article 227 does not state under which provision he has decided the matter and where the facts justify filing of petition both under

Article 226 and Article 227 and a petition so filed is dismissed by the Single Judge on merits, the matter may be considered in its proper perspective in an appeal. This Court held as aforesaid in view of the decisions of this Court in Umaji Keshao Meshram v. Radhikabai (1986 Supp SCC 401), Ratnagiri Distt. Central Coop. Bank Ltd. v. Dinkar Kashinath Watve (1993 Supp(1) SCC 9) and Suhilabai Laxminarayan Mudliyar v. Nihalchand Waghajibhai Shaha (1993 Supp(1) SCC 11)."

(3) In the case of Sharada Devi Vs. State of Bihar reported in AIR 2002 SC 1357 particularly para 9 on page 1359 the court observed as under:

"A Letters Patent is the charter under which the High Court is established. The powers given to a High Court under the Letters Patent are akin to the constitutional powers of a High Court. Thus when a Letters Patent grants to the High Court a power of Appeal, against a judgment of a single Judge, the right to entertain the appeal would not get excluded unless the concerned statutory enactment excludes an appeal under the Letters Patent."

7.2 The learned AGP has relied upon Division Bench judgment of this Court in the case of GUJARAT WATER SUPPLY AND SEWERAGE BOARD AND ANOTHER VS. KETANBHAI DINKARRAY PANDYA reported in 2003(3) GLR 2281 where on page 2294 in para 25 the Division Bench has observed as under:

"Coming to the present Letters Patent Appeals it is clear that "the Board" had filed all the writ petitions before this Court under Arts.226 and 227 of the Constitution of India. Not only that the learned single Judge has also exercised his power under Arts.226 and 227 of the Constitution of India. Having carefully gone through the common judgment and order passed by the learned single Judge of this Court, it is clear that the learned single Judge has mainly exercised his jurisdiction under Art.226 of the Constitution of India. In that view of the matter, we have no hesitation in holding that all these Letters Patent Appeals were maintainable. Hence, preliminary objections raised by learned Counsel Shri Pathak is rejected about the maintainability of these appeals."

THIS COURT'S FINDINGS ON PRELIMINARY POINT:-

8. We have considered the preliminary submissions of Mr.Mishra and the submissions made by Mr.Hasurkar in this behalf. We have also considered relevant decisions, which have been cited by both the learned advocates in this behalf. In our view, in this case, it is no doubt true that the State had originally challenged the judgment and order of Tribunal and, therefore, nomenclature was that the petition under Article 227 of the Constitution of India. However, in these set of circumstances, earlier, the order of this Court was passed thereafter, Hon'ble Supreme Court order was passed and, therefore, the Tribunal was not only concerned about the Industrial Dispute raised by the respondent, but also both the Tribunal as well as the learned Single Judge have considered earlier order of this Court as well as order of the Supreme Court. When it is examined, the High Court exercised power under Article 226 of the Constitution of India. Over and above when the learned Single Judge has reduced the back wages from 100% to 40%, then also, the learned Single Judge has exercised power under Article 226 of the Constitution of India.

8.1 In view of the same, and in view of the judgment, which we have cited, particularly judgment of the Supreme Court in the cases of Lokmat Newspapers (Supra), Kanhaiyalal Agrawal (Supra), Sharada Devi (Supra), judgments of this Court in the cases of Gujarat Water Supply and Sewerage Board (Supra) and Iswarlal (Supra), it is true that the learned Single Judge while examining the judgment of the tribunal, has exercised the jurisdiction under Article 227 of the Constitution of India. However, when learned Single Judge also examining order of the Division Bench as well as order of Hon'ble Supreme Court and then reduced back wages from 100% to 40% has adjudicate the matter under Article 226 of the Constitution of India. So the present Letters Patent Appeal filed by the State is maintainable.

SUBMISSIONS OF LEARNED AGP ON THE MERITS OF THE MATTER:-

9. As regards merits of the matter, Mr.Hasurkar, learned AGP has submitted the following points:

9.1 He submitted that judgment and order of both, the Tribunal as well as the learned Single Judge are clearly

illegal and contrary to the facts set out in this behalf. The learned AGP stated that in this case, in earlier proceedings when the petitioner has filed a petition under Article 32 of the Constitution of India and when Hon'ble the Apex Court has dismissed the writ petition on merits of the matter and only directed that respondent, however, will be at liberty to consider the case of the petitioner, in case in future vacancy occur, after giving him an opportunity to appear in examination that may be held by the GPSC In the facts and circumstances of the case, admittedly, petitioner has not appeared in the GPSC examination and, therefore, he was not selected by the GPSC, which is a Class II post. On the other hand, petitioner herein, State Government produced the order dated 15th April 1989, by which the State Government, through Director of Health and Family Planning has found that certain candidates have cleared GPSC examination and they have been selected by the GPSC and they were duly selected and appointed on the said post and in view of the said appointment, the temporary ad hoc appointment of the petitioner was sought to be removed from the service. To that extent, the order of the Government dated 15th April 1989 and subsequent order dated 27th April 1989 are consistent and in conformity with the order of the Hon'ble the Supreme Court. Both, the Tribunal as well as the learned Single Judge has not considered this aspect and once the Supreme Court has decided the point, it is not open to the Tribunal as well as to the learned Single Judge to enquire into other aspect in this behalf. When the State Government has passed the order in conformity with the order of the Supreme Court and when the Supreme Court's order has not been properly considered by the Tribunal as well as by the learned Single Judge, to that extent the order of the tribunal as well as of the learned Single Judge are liable to the quashed and set aside.

9.1.A. The learned AGP further submitted that in the earlier proceedings initiated by petitioner, the Division Bench dismissed the petition on merits of the matter. However, the Division Bench only allowed petitioner to make representation, so when the representation is made and no order is passed, the petitioner does not acquire any right to continue in service. This order has also not been considered by both, the Tribunal as well as by the learned Single Judge.

9.2 Learned AGP further submitted that both the Tribunal as well as the learned Single Judge has not considered the fact that the order of appointment dated 23rd April 1983 clearly postulates that appointment was

really ad hoc, temporary and it expressly stipulated the services of the respondent were liable to be terminated, either on completion of one year or the Government appoint any other Officer through GPSC. The appointment was absolutely ad hoc and the same can be terminated without giving any notice. Learned AGP submitted that the order of removal of the respondent was absolutely in consonance with the appointment order. He submitted that in view of these facts and circumstances of the case, the Tribunal has not properly considered the provisions of Section 25F read with Clause (bb) of Section 2(oo) in this behalf. He submitted that both the Tribunal as well as the learned Single Judge has not properly appreciated the definition of 'retrenchment' as contained in Clause (bb) of Section 2(oo), which provides certain exceptions in the definition of retrenchment. The learned AGP submitted that the facts set out in this case, clearly attract the provisions of Section Clause (bb) of Section 2(oo). Section 25F of the I.D.Act reads as under:

"Sec.25F. Conditions precedent to retrenchment of workmen:- No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until -

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice;

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(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette

9.3 The learned AGP has also relied upon Section 2(oo), particularly definition of retrenchment clause (bb) of sec.2(oo) as amended from 18.8.1984, which reads as under:

"Sec.2(oo) "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever, otherwise than as a punishment inflicted by way of disciplinary action but does not include -

(a) voluntary retirement of the workman; or

(b) retirement of the workman on reaching the age of superannuation if the contract of employment between the employer and the workman concerned contains a stipulation in that behalf; or

(bb) termination of the service of the workman as a result of the non-renewal of the contract of employment between the employer and the workman concerned on its expiry or of such contract being terminated under a stipulation in that behalf contained therein; or

(c) termination of the service of a workman on the ground of continued ill-health;"

9.4 He has stated that it is no doubt true that Sec.25F of the I.D.Act provides conditions to be followed if the workman is to be retrenched. However, Clause 2(bb) of sec.2(oo) of the said section provides that when the said conditions are not to be fulfilled. In this case, the appellant has submitted that the conditions of Clause 2(bb) sec.2(oo) are satisfied, so the finding of the tribunal and the High Court that the Government failed to comply with the condition of Sec.25F of the I.D.Act is illegal, bad and liable to set aside.

9.5 The learned AGP submitted that definition of 'retrenchment' under Clause 2(bb) of Section 2(oo) purports to exclude from the ambit of definition of retrenchment; (i) termination of service of a workman, as a result of non-renewal of contract of employment between the employer and workman concerned, on its expiry, or; (ii) the termination of contract of employment in terms of stipulation contained in the contract of employment, in that behalf. The first part relates to termination of service of workman as a result of non renewal of contract of employment between the employer and the workman concerned, on its expiry. The second part refers to "such contract" being terminated under stipulation in that behalf, contained therein. The expression "such contract" used in the second part refers to contract of

employment between the employer and the workman mentioned in the first part. Therefore, if there is stipulation in the 'contract of employment' between the 'employer and the workman' providing the mode and manner of termination of service, such termination of service has now specifically been excluded from the definition of 'retrenchment' by this sub-clause. The cases contemplated under both the parts, will not be a 'retrenchment'.

9.5A The learned AGP has submitted that in this case, the appointment order dated 24.12.1983 specifically provides that the appointment of respondent was for the period of one year on ad hoc basis or till the Government obtains any employees who are selected by the GPSC, whichever is earlier. The contract also provides for his appointment absolutely on ad hoc temporary and he is liable to be relieved from the service without any notice or without assigning any reasons.

9.6 In support of the same, learned AGP has relied upon following decisions:

9.6.1 The judgment of the Apex Court in the case of M.Venugopal vs. LIC of India, reported in 1994(1)LLJ p.597. In that case, the Development Officer was appointed by LIC and put on probation for a period of one year and the said period of probation was extended for a further period of one year. Under the terms of employment, he was required to do the minimum business. Since the officer failed to achieve the target, he was advised to fulfill the target during the probation period. As the officer failed to achieve the target, the service of the officer was terminated. The said order of termination was challenged. In that case, the ld. Single Judge of the High Court took the view that officer was workman and termination of his service will amount to retrenchment. However, the Division Bench has held that in view of clause (bb) of sec. 2(oo), termination of service of the officer shall not amounts to retrenchment and on that view, dismissed the writ petition. Before the Supreme Court, it was held that the termination of service of the appellant during the period of probation is in terms of order of appointment read with regulation 14, which shall be deemed to be now rules under the Act and, ultimately Supreme Court dismissed the SLP.

9.6.2 The learned AGP has relied upon the Constitution Bench judgment of the Hon'ble the Apex Court in the case of Punjab Land Development and Reclamation Corporation Ltd., Chandigarh Vs. Presiding Officer, Labour Court,

Chandigarh and Others, reported in 1990 (3) Supreme Court Cases, 682, particularly paragraph 82, which reads as under:

> "Applying the above reasonings, principles and precedents, to the definition in Section 2(oo) of the Act, we hold that "retrenchment" means the termination by the employer of the service of a workman for any reason whatsoever except those expressly excluded in the section."

9.6.3 The learned advocate has also relied upon a judgment of the Hon'ble the Apex Court in the case of Escorts Limited Vs. Presiding Officer and Another, reported in 1997 (11) Supreme Court Cases 521. The learned counsel for the petitioner relied upon a judgment of the Hon'ble the Apex Court in the case of Uptron India Ltd. Vs. Shammi Bhan And Another, reported in 1998 (6) Supreme Court Cases 538, particularly paragraph 32, which reads as under:

> "The contract of employment referred to in the earlier part of clause (bb) has to be the same as is referred to in the latter part. This is clear by the use of words "such contract" in the earlier part of this clause. What the clause, therefore, means is that there should have been a contract of employment for a fixed term between the employer and the workman containing a stipulation that the services could be terminated even before the expiry of the period of contract. If such contract, on the expiry of its original period is not renewed and the services are terminated as a consequence of that period, it would not amount to "retrenchment". Similarly, if the services are terminated even before the expiry of the period of contract but in pursuance of a stipulation contained in that contract that the services could be son terminated, then in that case also, the termination would not amount to "retrenchment". This view finds support from a decision of this Court in Escorts Ltd. Vs, Presiding Officer."

9.6.4 The learned AGP relied upon a judgment of the Division Bench of this Court (Coram: A.M.Ahmedi (as he was then) & R.J.Shah) in the case of J.J.Shrimali Vs. District Development Officer, Jilla Panchayat and Others, reported in 1989 22(1) Labour & Industrial Cases 689, particularly paragraph 17, which reads as under:

"In the cases on hand the appointment order in terms provided that the appointment was being made on purely ad hoc and temporary basis and was to last till scarcity works were in progress and that the services will be liable to termination without notice and without assigning any reason whatsoever. Thus the contract of employment carried a stipulation that the services of the petitioners will end as soon as the scarcity relief work is wound up or ceases. The petitioners were, therefore, told in no uncertain terms that the duration of their engagement was co-extensive with the duration of the scarcity relief works meaning thereby that their services will end on the closure of the relief works. It was said that C1. (bb) will not be attracted as the duration of the contract of employment is not fixed. We are not impressed by this submission. What C1. (bb) requires is that the contract of service must be terminated under a stipulation contained therein. In the present case the stipulation is that on a particular event happening, viz. conclusion of the scarcity relief operation, the contract of service will come to an end. That clearly falls within the second part of C1. (bb). We are, therefore, satisfied that C1. (bb) takes the termination in the present case outside the purview of 'retrenchment' defined in S. 2(oo) and, therefore, the provision of S. 25F of the Act will not be attracted."

9.6.5 The learned AGP has also relied upon a judgment of the Hon'ble High Court of Madhya Pradesh (Coram: Mr.R.C.Lahoti (as he was then) & Mr.S.K.Chawla, JJ) in the case of Mukhtyar Singh Vs. Food Corporation of India & Ors., reported in 1994 (2) Labour Law Journal 488, particularly paragraph 21, which reads as under:

"..... Our conclusion is that if the service of a workman is allowed to get terminated by non-renewal of the contract of service with him, it falls within the first part of (bb), and if the service of a workman is terminated acting under a stipulation in that behalf contained in the contract, it falls within the second part of (bb) and both cases falling within the "excepted category" are not retrenchment. The decision in C.M.Jitendra v. Management, B.E. Movies reported in 1985 LIC 1833, cited by the learned

counsel for the respondent supports our view."

9.6.6 The learned AGP relied upon the judgment of the Hon'ble Bombay High Court (Coram: Mr.Shrikrisha, J. (as he was then), in the case of The Deputy Director of Health Services, Nasik and another Vs. Sau. Latabai Rajdhar Paturkar, reported in 1996 (1) Labour & Industrial Cases 428, particularly paragraph 6, which reads as under:

"X X X

These observations of the Supreme Court are clear, clinching and leave no manner of doubt whatsoever that the termination of service of a probationary employee in exercise of the power reserved in the contract of employment in that behalf would clearly fall within and be covered by the exception clause (bb) of Section 2(oo) of the Industrial Disputes Act."

10. Learned AGP submitted that this Hon'ble High court is appraised about set up of ESI Hospital and even otherwise in reply to a statement of claim, it is clearly stated that the post which petitioner was holding, was that of Class-II Gazetted Officer and is subject to the provisions of BCSR. It was further stated that his service was that of an Officer. It is pertinent to note that the learned Single Judge and even the Labour Court ought to have considered the fact that respondent was holding a post which was held by a Gazetted Officer and the said post was being governed by BCSR, is a fact which was not denied before proceedings in the Labour Court and no contrary evidence was led before the Labour Court. Only that questions were asked in cross examination regarding he has any authority to grant leave or not or he has got any power to take disciplinary proceedings against employees, does not prove that he was not holding a post, which was of an Officer of Supervisor. Learned AGP relied upon the set up which was tendered before the Court during the hearing of the Letters Patent Appeal, could clearly reflect that he had control over other subordinates staff and therefore, he was holding a post of Supervisor in nature and he was drawing a salary which was more than that of a workman. Even otherwise, by any stretch of imagination it would be ridiculous to argue for a post, which was meant for gazetted officer and subjected to clearance from GPSC is not that of an Officer and person holding temporary or ad hoc appointment on such post is considered to be a workman.

10.1 In support of the same, he relied upon the decision of the Hon'ble the Apex Court (Coram: J.S.Verma & B.N.Kirpal, JJ), in the case of Heavy Engineering Corporation Ltd. Vs. Presiding Officer, Labour Court and others, reported in 1996 11 Supreme Court Cases 236, particularly paragraph 12 where the Court has held that:

> "..... When a doctor, like the respondent, discharges his duties of attending to the patients and, in addition thereto supervises the work of the persons subordinate to him, the only possible conclusion which can be arrived at is that the respondent cannot be held to be regarded as a workman under Section 2(s) of the Act."

10.2 Learned AGP submitted that the respondent has worked continuously uninterruptedly because of the policy decision, which was showed to the Court in the course of argument that government has resolved not to terminate the services unless and until GPSC candidate is available and therefore, fixed terms appointment, which was one of the conditions of the appointment, was done away. However, the condition that he was entitled to hold the post until GPSC candidate is available, was strictly adhered to and the same was put to the notice to respondent in appointment letter.

11. Learned AGP submitted that though, the respondent has worked from 15th April 1987 to 26th April 1989 and has also worked for 240 days during the year, the services of respondent cannot be regularized, as he was appointed only on ad hoc, temporary and subject to clearance of the GPSC examination. As the respondent failed to clear the GPSC examination and has not been selected by the GPSC, in any view of the matter, his services cannot be regularized.

11.1 The learned AGP submitted that the effect of the order of the Tribunal as well as order of the learned Single Judge is that the respondent who was only appointed on ad hoc, not regular one, temporary and not cleared GPSC examination, not selected by the GPSC, continued in service, whereas, other persons who are regularly cleared examination and selected by the GPSC are deprived of their right to hold the post in this behalf. In view of the same, the persons who are not legally appointed continued in service. He submitted that those persons cannot be continued indefinitely and cannot be regularized. If they are regularized, the same is illegal, bad and liable to be set aside.

11.1A The learned AGP submitted that Article 320 of the Constitution of India provides: "Functions of Public Service Commissions" and Article 320(1) provides that: "It shall be the duty of the Union and the State Public Service Commissions to conduct examinations for appointments to the services of the Union and the services of the State respectively." Clause 2 of the said Article provides duty of the commissions. Clause 3 provides that Union Public Service Commission should be consulted in service and Clause 5 provides that: "All regulations made under the proviso to Clause (3) by the President or the Governor of a State shall be laid for not less that fourteen days before each House of Parliament of the House of each House of the Legislature of the State."

11.1A(1).The learned AGP relied upon the judgment of the Hon'ble the Apex Court in the case of Delhi Development Horticulture Employees' Union Vs. Delhi Administration, Delhi & Ors., reported in (1992) 4 SCC 99, where the Hon'ble the Apex Court refuse the request of the petitioner that respondent be directed to regularize them.

11.1B The learned AGP also relied upon the judgment of the Hon'ble the Apex Court in the case of State of Haryana & Ors. Vs. Piara Singh & Ors., reported in AIR 1992, SC 2130 and (1992) 4 SCC 118), particularly paragraph 12, (on page No.2142 of AIR) and paragraph 25, (on page No.2151 of AIR), which reads as under:

PARAGRAPH 12

11.1C "As would be evident from the observations made and directions given in the above two cases, the Court must, while giving such directions, act with due care and caution. It must first ascertain the relevant facts, and must be cognizant of the several situations and eventualities that may arise on account of such directions. A practical and pragmatic view has to be taken, inasmuch as every such direction not only tells upon the public exchequer but also has the effect of increasing the cadre strength of a particular service, class or category....."

PARAGRAPH 25

"X X X

11.1D The normal rule, of course, is regular

recruitment through the prescribed agency but exigencies of administration may sometimes, call for an ad hoc or temporary appointment to be made. In such a situation, effort should always be to replace such an ad hoc/temporary employees by a regularly selected employee may also compete alongwith others for such regular selection appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the same of such an ad hoc/temporary employee."

11.1E The learned AGP relied upon the judgment of the Hon'ble the Apex Court in the case of State of M.P. & Anr. Vs. Dharam Bir, reported in (1998) 6 SCC 165, particularly paragraph 26, wherein, the Supreme Court has held as under:

"Whether a person holds a particular post in a substantive capacity or is only temporary or ad hoc is a question which directly relates to his status. It all depends upon the terms of appointment. It is not open to any government employee to claim automatic alteration of status unless that result is specifically envisaged by some provision in the statutory rules for alteration of status in a particular situation, it is not open to any government employees to claim a status different than that which was conferred upon him at the initial or any subsequent stage of service."

11.1F The learned AGP also relied upon the Division Bench judgment of this Court in the case of K.D.Vora & Ors. Vs. Kamleshbhai Gobarbhai Patel & Ors., reported in 2003 (1) G.L.H. 312. The Division Bench, in paragraph 17 of the judgment relied upon the aforesaid judgment in the case of Dharam Bir (Supra) has held as under:

"..... The exigencies of service often require ad hoc arrangement till the regular selection gets finalized. If the ad hoc employees who continued as ad hoc beyond one year are to be regularised or deemed to have been regularised as argued on their behalf, that would frustrate the very process of selection and appointment as per the mode and procedure prescribed by the statutory rules, and, as would

happen in the present case, no posts would be left for the regularly selected persons, because, two persons cannot hold the same post on a regular basis. As held by the Apex Court in Piyara Singh's case (supra), efforts should always be to replace such ad hoc employee by a regularly selected employees as early as possible. Such temporary employee may also compete along with others for such regular selection / appointment and if he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate. The appointment of the regularly selected candidate cannot be held in abeyance for the purpose of allowing the ad hoc employee to continue........"

11.1G The learned AGP further relied upon the judgment of this Court (Coram: Ms. R.M.Doshit, J.) in the case of Premgiri Devgiri Goswami Vs. State of Gujarat, in Special Civil Application No.807 of 2001. In that case also, the Government appointed petitioner as Insurance Medical Officer (Class-II_, subject to the terms and conditions mentioned in the said order. The said appointment was for a period of one year or till the candidate resumes duty; whichever be the earlier. In this cast also, when the petitioner was discharged from service, which is in consonance with the appointment letter, the same was challenged before this Court. The learned Single Judge, in paragraph 5 has held as under:

"It is a settled proposition of law that the posts which are required to be filled in by appointment of persons selected by Gujarat Public Service Commission cannot be filled-in by persons other that those who are regularly selected by the Commission. Appointment made by way of stop-gap arrangement, on ad hoc basis, does not confer a right upon the appointee to employment. Such service cannot be protected inspite of the availability of regularly selected candidates. The petitioner's claim for continuation in service beyond the period stipulated in the appointment order and beyond the period stipulated by this Court in Special Civil Application No.8962 of 1998 is without merit and requires to be rejected."

11.1H Being aggrieved and dissatisfied with the said order, the petitioner filed Letters Patent Appeal No.355 of 2002 and in that case, the Division Bench of this Court (Coram: M/s.B.J.Shethna & A.L.Dave, JJ), in

paragraph 6 held as under:

"In our considered opinion the learned Single Judge was absolutely justified in holding that it is a settled position of law that the posts which are required to be filled in by appointment of a person selected by the G.P.S.C. cannot be filled in by a person other that those who are not selected by the Commission. The appointment made by way of stopgap arrangement, on ad hoc basis, does not confer any right upon a person to get the employment. The writ of mandamus cannot be issued in such type of cases where the appellant - petitioner chose to change his job from employment to other quite frequently."

11.2 Learned AGP also relied upon the Full Bench judgment of this Court in the case of Amreli Municipality Vs. Gujarat Pradesh Municipal Employees Union, reported in 2004 (3) GLR 1841, particularly paragraph 12.1, which reads as under:

"12.1 After considering the decisions cited before us, the following principles emerge:

(A) No regulation or permanency can be effected de hors the statutory provisions or the guidelines.

(B) Long service put in by the workman itself may not be a ground to regularize services of ad hoc/temporary workmen against the sanctioned set up without following statutory procedure of recruitment. At the most, Labour Court / Industrial Tribunal can issue direction for consideration of absorption subject to availability of posts on the establishment.

(C) To avoid nepotism and corruption, no back door entry in service."

11.3 Learned AGP Mr.Hasurkar has also relied upon the order of this Court (Coram: K.M.Mehta, J.) dated 07.02.2002, passed in Special Civil Application No.1174 of 1991, where one Mr.Bharatkumar I.Gandhi, who was a temporary doctor and he has prayed for continuity of his service and all other retirement benefits, this Court after considering the judgments of this Court in the case of Premjibhai Gamit Vs. Executive Engineer (Panchayat) R

& B Division II, Surat & Another, reported in 1998 (3) GLR 2550, Jagdhsh U.Nanavaty & Ors. Vs. State of Gujarat & Ors., reported in 2000 (2) GLR 1703 and also judgment of this Court in the case of Jashtantkumar J.Desai Vs. Sabarkantha District Panchayat & Ors., reported in 42(1) GLR 860, where, in paragraph 6.2 this Court has considered the judgment of the Hon'ble the Supreme Court in the case of State of Gujarat Vs. P.J.Kampavat, reported in 1993 (1) GLR 848 and also the judgment of the Hon'ble the Apex Court in the case of Arjunbhai J.Chauhan Vs. State of Gujarat, reported in 1997 (3) GLR 2461 has held that in view of the provisions of BCSR Rules, which are applicable to the case of the petitioner in that case and as he was temporary servant, he is not entitled to any relief in this behalf.

11.4 In view of the aforesaid submissions, clearly, the order of the reinstatement granted by the Labour court as well as by the learned Single Judge is illegal and liable to be set aside. In view of the same, learned AGP further submitted that in this case, Labour Court has granted 100% back wages, whereas, the learned Single Judge has reduced the back wages to 40%. The findings of the learned Single Judge regarding back wages are also illegal and liable to be set aside.

11.5 Learned AGP further submitted that the present appellant is operating under Employment State Insurance Scheme in Statutory governed Act i.e. ESI Act. It was further submitted that as on date all these GPSC candidates are available and there is no post vacant where petitioner could be appointed. It was further submitted that as on date, the regularly selected GPSC candidates are awaiting for his turn and respondent is blocking regular appointment of such candidate, who is selected by GPSC and, therefore, also the present appeal may be allowed and judgment of the learned Labour Court and the learned Single Judge be set aside.

11.6 The learned advocate for the petitioner submitted that both, the labour court as well as ld. Single Judge, did not appreciate that the Government has to appoint regular medical officer who are successful in the examination held by the GPSC. However, till those candidates are not available and the persons who are suffering from various disease may not suffer for want of doctor in hospital, the Government has appointed present petitioner absolutely on ad hoc basis and as soon as regular candidate is available, the Government has decided to relieve the persons like the petitioner who is appointed on ad hoc basis. If the order of the labour

court as well as ld. Single judge is allowed to continued, then effect will be that persons who are not regularly appointed on ad hoc basis are continued and the persons who are successful in GPSC examination and selected by GPSC are deprived of services. So, the back door entry of persons like petitioner are continued in employment and regular selected persons will be suffering.

SUBMISSIONS OF MR T.R.MISHRA ON MERITS OF THE MATTER

12. Learned counsel for the respondents, Mr.T.R.Mishra stated that first ground under which present Letters Patent Appeal is filed is that the order passed by the learned Judge is contrary to law, facts and evidence on record. He submitted that the learned single Judge has not dealt with the contention raised in the original Special Civil Application. He submitted that doctor is not a workman within the meaning of Industrial Disputes Act, 1947 and the Establishment is not an Industry. He submitted that the respondent workman has no legal right for getting permanent post in the department.

13. The learned advocate for the respondent further submitted that reliance placed by the learned counsel for the petitioner upon a judgment of the Hon'ble Supreme Court of India, reported in 1996 (11) SCC 236 that 'doctor is not a workman', was not cited before the learned Judge. However, the aforesaid decision is patently clearly as is based on the appreciation of evidence about the nature of duties and function of the doctor and basing the decision on the factual aspect of the case, the Supreme Court held that doctor is not a workman. In the present case, the respondent workman was not performing any managerial or supervisory duty. He was working in the dispensary maintained by the E.S.I. wherein there is Insurance Medical Officer and Manager of the Dispensary, all doctors and staff and nurses has to work under the administrative control and supervision of the Manager of the dispensary. The present case is based on factual aspect which has not been controverted before the trial court. Therefore, the ground (a) raised in the Appeal Memo with the order and judgment is contrary to law, facts and evidence is totally vague and misleading.

14. So far the issue with regard to contention about

the workmen is concerned, respondent workman has cited several decision. However, learned counsel for the respondent relied upon the Division Bench judgment of this Court in the case of Arun Mills Ltd. Vs. Dr.Chandraprasad C. Trivedi, reported in 1976 (32) Indian Factories and Labour Reports 323, where the Division Bench has held that:

"Doctor does a technical work - He falls within definition of 'workman' in S. 2(s) and is entitled to bonus declared by company."

15. Learned advocate for the respondent contended that though the respondent workman was employed purely on ad hoc basis and the provisions of Section 25(F), (G) & (H) of the Industrial Disputes Act are applicable to the persons who work on ad hoc basis and ad hoc employees are not covered by the provisions of Clause (bb) of Section 2(oo). He submitted that, learned counsel for the petitioner has relied upon several decisions in this behalf. However, learned counsel for the respondent begs to rely upon the judgment of the Hon'ble the Apex Court in the case of Visramadittya Pande Vs. Industrial Tribunal, reported in 2001 Lab.IC 646, particularly paragraph 6, the relevant part of which reads as under:

15A. "The appellant ought to have been ordered to be reinstated in service once it was found that his services were illegally terminated in the post he was holding including its nature. Thus in our opinion both the Tribunal as well as the High Court were not right and justified on facts and in law in refusing the relief of reinstatement of the appellant in service with back wages. But, however, having regard to the facts and circumstances of the case and taking note of the fact that the order of termination dates back to 19-7-1985 we think it just and appropriate in the interest of justice to grant back wages only to the extent of 50%."

16. The learned counsel for the respondent relied upon the judgment of this Court in the case of Deputy Executive Engineer Vs. Jiviben V.Pandya, reported in 2000 (2) CLR 881. In that case, the Court held that termination of service of clerk-cum-typist without complying the provisions of Section 25B (Re: Definition of continuous service) of the Industrial Disputes Act, therefore, the learned Single Judge has confirmed the findings of the labour Court that termination of service is illegal contravening the provisions of Section 25 of

the Industrial Disputes Act as respondent has put in more than 240 days of service in a year. In that case, the Court confirmed the findings of the Labour Court that before termination of her services, the petitioner has neither served the respondent with any notice nor notice in lieu of notice and also not any order of retrenchment compensation to petitioner. In that case, the Labour Court granted full back wages. However, the learned Single Judge as far as back wages concerned, in paragraph 8 held that: "the respondent workman is not entitled to any back wages from the date of termination 1st November 1983 to 20th October 1985 and entitled 60% back wages from the date of reference 20th October 1985 till the date of award 8th October 1998 and full back wages from the date of actual reinstatement."

17. Learned counsel for the respondent relied upon several decisions in this behalf and contended that even ad hoc, temporary employee is covered by Provisions of Section 25(F) of the Industrial Disputes Act, 1947 and if an employee work for 240 days continuous service, he is entitled for protection under Section 25(F) and noncompliance of the said provision renders the termination illegal, void ab initio and consequential relief of reinstatement with full back wages is the only relief.

18. The learned counsel for the respondent submitted that in view of these facts and circumstances of the case, this is not a fit case where this Hon'ble Court at appeal stage should disturb the finding recorded by the Labour Court and confirmed by the learned Single Judge modifying the order by reducing the part of back wages.

ADDITIONAL SUBMISSIONS OF MR.T.R.MISHRA, WHICH WAS NOT THE SUBJECT MATTER OF AWARD OF THE TRIBUNAL AS WELL AS FINDINGS OF THE LEARNED SINGLE JUDGE:-

19. Learned advocate for the respondent stated that the respondent had filed affidavit dated 24th January 2002, in Civil Application No.11984 of 2001. By the said affidavit, he has produced affidavit in reply filed by the respondent in June 2001. In the said affidavit of June 2001, he has narrated the order passed by this Court on 02.12.1993. He has further stated that he has earlier originally filed Civil Application No.1349 of 1995. The said Civil Application was withdrawn with a view to file representation before the authorities. Pursuant to that, the respondent had filed representations dated 17th July 1995 before the Government and reminders were also sent on 12th September 1995 and 28th May 2001. He has also

produced appointment order in respect of all these persons dated 7th April 1993 and order dated 29th November 2000 in this behalf. Relying upon the said affidavit, learned counsel for the respondent stated that in the said affidavit the respondent has pointed out that during the pendency of the petition, the Government has appointed another 5 doctors viz. Bharatkumar J.Gandhi, Neela M.Trivedi, Jyotindra V.Bhatt, Jaimini J.Trivedi and Mallika S.Shah by order dated 7th April 1993. He submitted that there was further order of appointment also dated 29th November 2000. In the said order, it has been stated that though, all the five persons have not cleared Gujarat Public Services Commission examination, however, they were still appointed for one year on ad hoc basis. He, therefore, submitted that the case of the petitioner is exactly identical. Though all the five persons were similarly situated, they were given appointment, whereas respondent has not been given appointment. Though the said affidavit has been produced in the Letters Patent Appeal in January 2002, the State has not filed any reply, controverting this point and, therefore, this Court may say that, even in any view of the matter, the action of the petitioner, not to continue the respondent on the ground that he has not cleared G.P.S.C. examination, is also bad in law and discriminatory.

20. Learned advocate for the respondent therefore submitted that, though this Court has directed to make representation and the detailed representation have been made, the respondent workman was not taken on duty nor any representation was replied by the respondent. The representation was also not rejected and the said representation was made pursuant to the direction issued by the Hon'ble Court.

21. The respondent has also filed affidavit dated 12th July 2004, by which resolution dated 8th May 1999 has been produced, wherein large number of doctors were exempted from appearing in the competitive examination to be conducted by the G.P.S.C. and their services have been regularized and made permanent.

LEARNED AGP'S REPLY TO MR.T.R.MISHRA'S ADDITIONAL SUBMISSIONS:-

22. Learned AGP in rejoinder stated that the contention of Mr.Mishra regarding discrimination amongst other 5 doctors and the Government has exempted certain persons from appearing in GPSC examination, the said contention has been raised for the first time in the

Letters Patent Appeal. However, he submitted that Dr.Bharat Kumar J.Gandhi, Neella M.Trivedi, Jyotindra V.Bhatt, Jaimini J.Trivedi and Mallika S.Shah, all the petitioners have originally filed Special Civil Application No.6099 of 1986 before this Court, in which they have prayed that respondent viz. State of Gujarat, Director of Employment, State Insurance Corporation and Secretary - Health be directed to regularize the appointment of the petitioner, in this case Class II Medical Officer in Employee's State Insurance Scheme and further to declare that petitioner should not be compel to pass GPSC examination. The said petition was filed somewhere in November 1986. It may be noted that in that matter, Civil Application was also filed for obtaining certain relief. However, it may be noted that this Court (Coram: A.P.Ravani, J.) pleased to dismiss the said writ petition, where almost identical challenge was raised by those petitioners, which has been raised in the present petition. This Court by its order dated 10.10.1988 pleased to reject the same in this behalf. The order of Justice Ravani reads as follows:

22A "The petitioners were appointed as Ayurvedic Medical Officers on purely ad-hoc basis and subject to the availability of the candidates selected by the G.P.S.C. Now the petitioners services are sought to be terminated on the ground that candidates selected by the G.P.S.C. are available.

Petitioners pray that respondents should be restrained from terminating their services and they should be regularized on the post of Medical Officer, Class II and they should not be compelled to pass G.P.S.C. examination. The prayer cannot be granted for the simple reason that the petitioners' initial appointment itself was on ad-hoc basis and it has been specifically mentioned in the order of appointment that their appointment will be purely temporary and ad-hoc till the G.P.S.C. candidates are available. Thus the petitioners have no right to claim that they be regularized. Similar view has been taken by this Court (Coram: A.M.Ahmedi (as he was then) & D.H.Shukla, JJ) in Special Civil Application No.5993/86 decided on 20th April 1988. There is no substance in the petition. Hence rejected. Notice discharged.

At this stage, learned counsel for the petitioners requests that the ad-interim relief

granted earlier on November 20, 1986 by this Court (Coram: I.C.Bhatt, J.) be continued for some time so as to enable the petitioners to challenge the legality and validity of the aforesaid order. In the facts of the case, it is directed that ad-interim relief granted earlier shall continue upto October 1988."

23. Being aggrieved and dissatisfied with the aforesaid order, those petitioners have filed Letters Patent Appeal before this Court being No.398/1988. The Division Bench of this Court (Coram: P.R.Gokulkrishnan, C.J. & R.J.Shah, J.) was pleased to dismiss the said Letters Patent Appeal by judgment and order dated 26th October 1988. Being aggrieved and dissatisfied with the said order of the Division Bench, the petitioner preferred Special Leave to Appeal (Civil) No.14942 of 1988 before the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India was pleased to pass following order:

23A "The Special leave petition is dismissed. But as stated that selections have already been made through the Public Service Commission. If after the candidates selected are appointed and if any vacancies are left, these petitioners will be given first preference and will be accommodated in these posts and they may not be discontinued from service. In future they will be given one more chance to appear for selection."

24. It appears that there were some violation of the order of the Supreme Court and, therefore, petitioner had filed Contempt Petition No.43 of 1989 before the Supreme Court of India. In that contempt matter, Hon'ble the Supreme Court of India, on 20th November 1989, pleased to pass following order:

"XXX

Perused the counter affidavit and heard counsel for the petitioners. There are conflicting questions as to the existing vacancies that are available for appointment of the petitioners. The petitioners in the reply affidavit at para 4 have stated that there are three more vacancies likely to arise in the near future and they could be appointed against those vacancies. We do not express any opinion. We only make a direction that these petitioners be accommodated against vacancies if there are no public Service

Commission candidates available. The contempt petition is disposed of dropping further proceedings."

25. Learned AGP submitted that in view of these proceedings, those 5 persons have been appointed only on the basis of the Supreme Court order on ad hoc basis on 03.04.1993. As and when the Government gets regular employee, the Government may discontinue them, because Supreme Court has also made it clear in this behalf accordingly. It may be noted that, when those five persons filed petition before this Court as well as before the Supreme Court, pursuant to that, the Government has passed the order in their favour. Therefore, their case and the case of the petitioners cannot be considered same/identical in this behalf. In view of the same, the respondent cannot agitate that there is violation of Article 14 of the Constitution of India.

26. Learned AGP in rejoinder further submitted that, it is an additional affidavit which has been filed was not the subject matter of the decision of the Labour Court and well as of the learned Single Judge and, therefore, the Government had no opportunity to met with their case in this behalf. So, after this Court came to the conclusion to consider the case, then proper opportunity may be given to the government, so that the Government can explain their position after producing necessary evidence in this behalf.

27. Over and above, he further submitted that both the Tribunal as well as the learned Single Judge had no occasion to consider and, therefore, Government had no opportunity to meet the aforesaid case in this behalf, though the respondent had file affidavit before the High Court in this behalf.

BACK WAGES:-

28. Secondly, in this case, admittedly, the petitioner has not worked from the date of removal from service and if the order of 40% back wages as held by the ld. Single Judge to be given to the respondent, then the Government has already paid salary to a regular doctor who is working and over and above the respondent who is not qualified and who has not worked, the Government has to pay the money to that person, (i.e. 40% of the back wages). Therefore, public money is wasted. The authorities has also complied with the clause(bb) of sec. 2(oo) and, therefore, termination/removal of the service

of respondent is quite legal and valid and, therefore, in any case, the order of reinstatement and back-wages are bad in law because regular person is already working in the hospital as a medical officer. So, the appointment of the respondent will be a surplus in this behalf. So, there will be additional burden of regular salary of the respondent over and above 40% of the back-wages. The learned advocate for the petitioner, therefore, submitted that the labour court as well as learned Single Judge ought not to have passed the order of back wages in this behalf.

29. Learned counsel for the respondent stated that the respondent-workman filed representation dated 17th July, 1995, before the Government and reminder was also send on 12th September, 1995, and 28th May, 2001, and he has also filed civil application No.11984 of 2001 and also affidavit somewhere in June 2001. By that civil application, he has narrated the cases of five other doctors who have not cleared GPSC examination and who have not selected by GPSC. However, they have been continued in service. It is the case of the respondent that in spite of the aforesaid representations filed by the respondent, the petitioners have neither replied to the respondent nor issued any appointment order in connection with the services of respondent. It may be noted that the said representation was filed pursuant to the direction issued by this Court.

CONCLUSION:-

30. We have considered the rival contentions of learned AGP as well as of Mr.T.R.Mishra in this behalf. We have given our anxious consideration in this behalf and we come to conclusion as under:

30.1 We have gone through the order of the tribunal as well as the order of the learned Single Judge. In our considered view, the tribunal as well as the learned Single Judge have not properly considered the order of the Division Bench of this Court passed on 30th March, 1987, in Special Civil Application No.5 of 1986 for which we have already made reference in para 3.5 as well as in para 3.6. We are also of the view that the tribunal as well as the learned Single Judge have not properly considered the order of the Hon'ble Supreme Court dated 16th April, 1989, in Writ Petition No.1290/88 filed by the respondent for which we have made reference in para 3.8.

30.2 It may be noted that this Court also dismissed

the Writ Petition of the petitioner with a liberty to make representation and the Hon'ble Supreme Court also dismissed the writ petition filed by the respondent on merit and only imposed condition on the respondent (before writ petition - present petitioner) that it had only liberty to consider the case of petitioner (respondent herein), in case any future vacancy occur, after giving him an opportunity to appear in the examination that may be held by the GPSC. We have considered the facts and circumstances of the case and admittedly the respondent has not cleared the GPSC examination and he has not been selected by the GPSC. Here by the impugned orders dated 15th April 1989 and 27th April 1989, the authority has appointed only persons who have cleared the examination of GPSC and selected by the GPSC. In our view the order of relieving the respondent is quite legal, valid and is in consonance with provisions of the Act, and also in consonance with the order of the Division Bench of this Court as well as the order of the Hon'ble the Supreme Court. In our considered view, once the Division Bench and the Hon'ble Supreme Court have passed the order and the authority has acted as per the order of the Hon'ble Supreme Court. both the tribunal as well as the learned Single Judge had no jurisdiction to consider any other aspect in this behalf. In our view the court below have not properly appreciated the present facts and circumstances of the case and, therefore, on this count, both the order of the tribunal as well as the order of the learned Single Judge granting relief of reinstatement and backwages is liable to be quashed and set aside.

30.3 We have also considered the facts and circumstances of the case. Here, the order of the appointment is absolutely temporary, ad hoc and also stipulate that as soon as the candidate, who has cleared the GPSC examination is available, the services of the respondent is liable to be terminated or removed. In this context, the Tribunal has considered the provisions of Industrial Disputes Act. So the provisions of Section 25F of Industrial Disputes Act apply and as the order is contrary and inconsistent with provisions of Section 25F, the order of removing the petitioner on 15th April 1989 and 27th April 1989 are liable to be quashed and set aside. In our view, both the Tribunal as well as learned Single Judge has not considered Clause (bb) of Section 2(oo), which provides certain exception to the definition of retrenchment, particularly in light of the facts and circumstances of the present case. We have not only considered the provisions of the Act but we have also considered the judgments of the Hon'ble the Apex Court in

the case of M Venugopal (Supra) and Punjab Land Development Officer (Supra), Escorts Ltd (Supra), Uprton India (Supra), and also Division Bench judgment of this Court on the case of J.J.Shrimali (Supra) and also the Division Bench judgment of the Hon'ble Madhya Pradesh High Court in the case of Mukhtyar Singh (Supra), judgment of the Bombay High Court in the case of Sulatabai Rajdhar (Supra). In view of the appointment order and in view of definition of Clause bb of Section 2(oo) and in view of the aforesaid decisions, in our view, the provisions of Section 25F will not be applicable in this case and, therefore, the findings of the Tribunal as well as of the learned Single Judge, order of removing the respondent is contrary and inconsistent with provisions of Section 25F, is illegal and bad in law.

30.4 We have considered Article 320 of the Constitution of India. We have also considered the judgments of the Apex Court as well as judgments of this Court. In view of these decisions, the directions given by the Tribunal as well as by the learned Single Judge that the respondent, though not regularly appointed, be continued in service, is contrary to and inconsistent with the aforesaid principles, which we have referred. In view of the same, the order of the Tribunal as well as the learned Single e Judge holding that the services of the respondent be continued, is also illegal and liable to be set aside. Both the Tribunal as well as the learned Single Judge has not taken into consideration this aspect in this behalf.

30.5 "Concept of no work no pay :- It would be wholly inequitious to compel the employer to pay the employee when he has not worked to earn his wages. The Court should not be too strict in treating the contract of service for a certain period and for a certain wages as indivisible. After all, a man should work to earn his wages and if he has not worked, he cannot be permitted to claim wages bringing in too technical a rule that the contract is indivisible and in the absence of statutory provisions and rules, the employer must pay out wages even though not earned by the employee by performance of actual work and the employer must seek his remedy only by claiming compensation elsewhere....."

{Re: Payment of Wages Act by R.B.Sethi - 1997 Edition Page No.238)

30.6 As regards back wages, in this case, the Tribunal held that the order of the removal of the respondent is

illegal and bad and, therefore, awarded 100% back wages. The learned Single Judge confirmed the order of the reinstatement, but however, reduced the back wages to 40%. In this case, on merits of the matter, we have held that order of the removal of respondent is legal and valid on the reasons, which we have given earlier in this behalf. Neither appointment nor payment of back wages, as such are common rights. They are statutory rights provided under the provisions of Industrial Disputes Act. In view of the same, this relief, can however, be granted by the Tribunal on certain conditions. In our view, once the order of discharge or dismissal, not set aside and is upheld by us, on the merits of the matter, there is no question of granting any back wages in this behalf. It may be noted that in this case, the workman was discharged from service from 27th April 1989. Though the Tribunal has passed order dated 27th April 1989, granting reinstatement and thereafter, the learned Single Judge has also granted reinstatement by order dated 14th August 2001, however, in view of the stay granted by the learned Single Judge earlier and thereafter by Division Bench only, the respondent has been reinstated by the order of the Division Bench dated 01.12.2003. In view of the same, the fact remains that from 1989 till 2003, the respondent has not worked in the establishment as a Medical Officer. In his place, regular persons have already been appointed, for which, the Government had already paid the amount of salary to them in this behalf. In view of the same, the principle 'no work no pay' can be applicable in this case. We have also considered in this behalf the provisions of Payment of Wages Act, which also provides that when man works, the man is paid for the salary in this behalf. If the man does not work, then under this Act, directions are also provided from absence from duty, deduction of salary. It may be noted that only the employees attended the place of work, must put work allotted to them. It is for the work and not for their mere attendance that the wages stock salaries are paid. In this case, admittedly, from 27th April 1989 till 01.12.2003, the respondent has not worked in this behalf. It may be noted that the employer is a State Government, therefore, any amount of back wages, which may be given to respondent, is a money of the State Government and which is public money, which is a tax payers money. It may be noted that as regards back wages, it is the sole discretion of the Tribunal in this behalf. In our view, when we have decided that order of the removal of the respondent is legal and valid in facts and circumstances of the case, we are of the view that respondent is not entitled to any back wages in this behalf. In view of the same, the orders of back wages

granted by Tribunal as 100% and by the learned Single Judge as 40% are clearly illegal, without jurisdiction and liable to be set aside. In our view, both the Tribunal as well as the learned Single Judge has not considered the principle of 'no work no pay' in this behalf and have not properly exercised discretion in granting back wages in this behalf.

30.7 In view of the fact that there is no clear evidence as to whether the respondent, over and above, doctor, whether he had any supervisory work or not. In view of the same, the contention of the respondent that he is not a workman, we have not considered this aspect in this behalf. In view of the fact that there is no clear evidence lead by the Government in this behalf. So, we do not give any finding on this point.

30.8 It may be noted that in this case, Mr.T.R.Mishra has filed additional affidavit dated 24th January 2002 in Civil Application No.11984 of 2001. He has also filed additional affidavit in June 2001. The petitioner has also filed representation dated 17th July 1995 before the Government and reminder dated 12th September 1995 and 28th May 2001. He has also produced appointment order dated 7th April 1993 and order dated 29th November 2000, by which, he has pointed out that Government has appointed another five doctors viz. Bharatkumar J.Gandhi, Neela M.Trivedi, Jyotindra V.Bhatt, Jaimini J.Trivedi and Mallika S.Shah. It is his allegation that all these five persons have not cleared GPSC examination. However, they were appointed and they are still continued in service on ad hoc basis. Though, in the case of the respondent herein, the ESI has stated that they have already appointed another persons, who have cleared GPSC examination and selected by GPSC. If the respondent has been removed from service, why these five persons, who are identically situated, (who have not cleared GPSC examination who are not selected by GPSC) are not removed till today. All these facts were produced by the respondent by filing affidavit in Letters Patent Appeal in January 2002, but State has not filed any reply in this behalf.

30.9 It may be noted that the respondent has also made representation and the Government has not passed any order to the representation, either to accept or rejecting the same.

30.10 The respondent has also filed affidavit dated 12th July 2004, by which resolution dated 8th May 1999 has been produced, wherein large number of doctors were

exempted from appearing in the competitive examination to be conducted by the G.P.S.C. and their services have been regularized and made permanent. It may be noted that the Government has not clarified why this resolution has been passed and whether this resolution will be applicable to the case of the respondent or not.

30.11 As regards the additional contention of Mr.Mishra that other 5 doctors have been appointed, for which learned AGP Mr.Hasurkar has invited our attention to the orders of the learned Single Judge, Division Bench and order of the Hon'ble the Supreme Court. Those orders and those facts were not before the learned Single Judge. It is no doubt true that workman has filed additional affidavit and pointed out facts of this case, however, in what context they were continued and in what context services of those employees was given exemption, all these aspects were not before the learned Single Judge.

30.12 It may be noted that all these aspects have not been considered by the learned Single Judge or by the Government in this behalf. We are, therefore, direct the State Government to decide this issue in accordance with law. It will be open for the petitioner as well as the respondent to produce any additional evidence and thereafter, the same issue has to be adjudicated. Till the said adjudication is done, the respondent will be continued in service.

30.13 It may be noted that relief regarding back wages can be moulded in the facts and circumstances of the case. If the directions of back wages is to be given here, the petitioner (employer is a Government Corporation) and to saddle the petitioner Government Corporation and his exchequer, which is meant for public benefit, full back wages for entire period would be too harsh to the Government (See AIR 2000 SC 454, in the case of Management of M.C.D. Vs. Prem Chand Gupta & Anr.)

31. In view of the same, Letters Patent Appeal is partly allowed. The order of the Tribunal dated 27th April 1989 as well as judgment and order of the learned Single Judge dated 14th August 2001 are quashed and set aside. However, in view of the subsequent order of the Division Bench dated 1st December 2003, by which Division Bench has granted reinstatement, the respondent will continue in service till petitioner decides the representation of the respondent. Appeal is partly allowed and disposed of to the aforesaid extent with no order as to costs.

(D.K.Trivedi, J.)

(K.M.Mehta, J.)

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